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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 34.

GEORGE HARRIS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

APPLICATION OF BROTHERHOOD OF RAILROAD TRAINMEN FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Application for Leave to File Brief	1
Argument	2

CITATIONS.

CASES:

Go-Bart Co. v. *United States*, 282 U. S. 344 (1941)	4
Marron v. *United States*, 275 U. S. 192 (1927)	2, 3
United States v. *Lefkowitz*, 285 U. S. 452 (1932)	4

CONSTITUTION:

Fourth Amendment	2, 4

TEXTS:

Chafee, Freedom of Speech (1930)	2
Fraenkel, Concerning Searches and Seizures (1921), 34 Harv. L. Rev. 361	2

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APPLICATION FOR LEAVE TO FILE BRIEF.

The applicant, the Brotherhood of Railroad Trainmen, is a labor union, the nature of whose membership is indicated by its name. It feels that labor organizations have a particularly vital stake in the Constitutional protection against unreasonable searches and seizures. A rule of law developed today in a case involving a petty criminal may

tomorrow rationalize an oppression of economic dissidence. Police infringements of civil liberties frequently have an economic or political inspiration, as contrasted with a simple zeal to apprehend and convict criminals. Labor leaders and organizers have traditionally been among the principal victims of such abuses.

For these reasons, the Brotherhood of Railroad Trainmen asks leave to file a brief as amicus curiae in support of the application for rehearing in the above-entitled case.

ARGUMENT.

Few provisions of the Constitution have a clearer and simpler motivation than the Fourth Amendment's prohibition of unreasonable search or seizures. The odium which attached to the writ of assistance inspired the provision, and it is in this tradition and with this background that the Amendment must be applied. See Chafee, *Freedom of Speech* (1930) 279; Fraenkel, *Concerning Searches and Seizures* (1921) 34 Harv. L. Rev. 361, 362-5.

The vice of the writ of assistance was its generality, as indicated by its alternative name, the "general warrant." True it was also issued without an adequate showing of cause for search, but this too derived from its generality. For what prior adequate showing can be made to justify a search for objects of any nature and kind whatsoever? A warrant which supports a general search and testimony as to whatever is found is thus a writ of assistance no matter how circumscribed its text.

The offensiveness of the general warrant arose from the indignity of a ransacking search, particularly when conducted in the home, and from the exposure to the eyes of the searchers of personal and private affairs which had nothing to do with any offense against the crown. The founders of the Republic chose to protect the people from this oppression even if at some cost to police efficiency.

In *Marron* v. *United States*, 275 U. S. 192 (1927), this Court refused to permit a search warrant to support a

seizure of objects other than those described therein. If it had held otherwise, the general writ would, for all practical purposes, have been resurrected.

Under the Court's holding in the instant case, however, a lawful arrest, no matter how petty the offense charged, permits a general search. This search, and the evidence derived therefrom, are not limited to objects relevant to the offense for which the arrest was made. The search may be a ransacking of the arrested person's house, including an examination of his concealed private papers. Under the *Marron* case, a warrant of search cannot be used as a writ of assistance; but under the present holding, a warrant of arrest or a lawful arrest without warrant can be used to fulfill the functions of the general writ, as already described.

It is true that the arrest must be supported by a showing of probable cause for arrest. This is a minor handicap for any alert police official in view of the multitude of petty offenses which even the most exemplary citizen may commit. The Constitution, moreover, requires not merely cause for arrest, but cause for the search. The arrest itself is a sufficient cause to support a search of the person arrested and objects within his physical reach, in order to deprive him of instruments of escape or harm to the arresting officials, or of fruits of crime which he might destroy. No such justification arises, however, to support a five-hour search of a home from top to bottom, including an examination of papers deposited in desks or bureau drawers.

The handicap of showing cause for an arrest is more than compensated for, moreover, by the discretion assigned to the police official, rather than the magistrate, to determine the premises of the arrest, and hence of the search.

The Fourth Amendment requires that searches be made only upon probable cause shown to a magistrate. It is a frustration of the Amendment's intent to permit a showing of cause for an arrest to dispense with any showing for a search. No cause can, moreover, constitutionally be shown for a search for unspecified articles.

The Court's opinion supports its holding as an application of the familiar doctrine of incidental search accompanying a lawful arrest. But the Constitutional guaranty should not be vitiated by an extension of decisional law. The scope of an "incidental search" must be severely limited if the Fourth Amendment is to be more than a platitude. This case carries the incidental search doctrine to an unheard of extreme, in flat contradiction to *Go-Bart Co.* v. *United States*, 282 U. S. 344 (1941) and *United States* v. *Lefkowitz*, 285 U. S. 452 (1932). The majority considers the search to have been incidental to the arrest because the offense charged in the warrant involved small pieces of paper. But this conception of what is "incidental" is an innovation. The search that may accompany an arrest is an incident of the arrest only in the sense that it is justified by the arrest itself rather than by an independent warrant. The fact of its incidental nature does not mean that its scope is defined by the offense for which the arrest is made, for in that case the warrant of arrest clearly becomes a warrant of search. Instead, the scope of the search is defined by the circumstances and locus of the arrest (not by the nature of the charge), and is confined by the Fourth Amendment. Under this test, a five-man, five-hour search of a small apartment is certainly not "incidental" to an arrest which presumably was made by one man in a matter of seconds.

In the *Go-Bart* and *Lefkowitz* cases, the doctrine of incidental search yielded to the Constitutional purposes, even where the objects found were relevant to the crime for which the arrest was made. In this case, the Constitutional purposes have been made to yield, even though the discovered objects had no such relevancy. The Court's opinion distinguishes the *Go-Bart* and *Lefkowitz* decisions on the grounds that in those cases the officers had entered the premises "ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending

to connect the accused with some crime." Such a distinction, however, limits the Amendment to the impossible confines of proof of the subjective intent of the enforcement officials. And that the objects discovered in this case were properly subject to seizure can by no means justify the making of the search. The offensive features of a general search which we earlier pointed out—indignity and the exposure of private affairs—exist even though objects found may be properly seized.

It is in the post-war turmoil that the liberties guaranteed by the bill of rights are at once most likely to suffer and most essential to our democratic processes. We submit that the Court's decision jeopardizes the Fourth Amendment and that a rehearing should be granted.

Respectfully submitted,

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